Lake Mary Health Care Associates, LLC, d/b/a Lake Mary Health and Rehabilitation *and* Annie Hollie and Service Employees International Union, 1199 Florida, AFL–CIO. [1] Case 12–RD–978

August 27, 2005

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held September 17, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 37 for and 40 against the Union, with 1 challenged ballot, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, adopts the hearing officer's findings[2] and recommendations to sustain part of the Petitioner's Objection 4 for the reasons set forth below, and finds that the election must be set aside and a new election held.[3]

The only issue in this case is whether the Employer's announced elimination of an extra shift bonus improperly interfered with employees' free choice in the election. Contrary to our dissenting colleague, we agree with the hearing officer that the Employer engaged in objectionable conduct by announcing, just prior to the election, the elimination of its practice of paying a $25 extra shift bonus to certified nursing assistants (CNAs) for each extra shift they worked after 40 hours.

The Employer operates a 120-bed skilled nursing and rehabilitation center facility as well as a 32-bed secured Alzheimer's unit. On August 6, 2003, the Union was certified to represent a unit of service employees that included CNAs. On August 9, 2004,[4] a decertification petition was filed.

The CNAs worked various shifts and had a variety of days off because the Employer operates 24 hours a day 7 days a week. The Employer had a longstanding practice of paying an extra shift bonus of $25 to CNAs for each extra shift they worked after 40 hours. Two days before the September 17 decertification election, the Employer announced through the signup sheet posted for extra shifts, and by word of mouth, that there would no longer be an extra shift bonus. Scheduling secretary Martha Rodriguez, who posted the notice after talking with the director of nursing, testified that the Employer was intentionally trying to get the same work from the bargaining unit employees for lower wages. CNAs were quite upset over the elimination of the bonus.

It was not until about 24 hours later, at 2:30 p.m. the following day—the day before the election—that the Employer removed the "No Bonus" signup sheet. Rodriguez orally informed employees later that afternoon that the bonus had been reinstated. Despite Rodriquiz' assertion that she told "everyone" of the bonus restoration, only certain CNAs worked the September 16 afternoon shift. Further, although Rodriguez testified that she repeated this message on September 17, the date of the election, the polls opened at 6:30 a.m. that morning, and the Employer did not establish that Rodriguez informed employees prior to the start of the election that the bonus had been restored.

We agree with the hearing officer that the Employer's announced elimination of the extra shift bonus interfered with the election. The cancellation of benefits during the critical period is reasonably susceptible of being understood by bargaining unit employees as interference with their Section 7 rights.

The dissent says that no rational employer "reasonably calculates" that announcing the rescission of a popular benefit shortly before a decertification vote is likely to influence employees to vote *against* the union. However, the test is not what the *employer* would calculate, but rather the impact of the employer's action on a reasonable employee. It is extremely doubtful that a reasonable employee would infer that the Employer's message was to influence the employees to vote for the union. After all, the Employer had waged a vigorous antiunion campaign. Rather, in light of that campaign, it is far more reasonable to believe that employees would view the Employer's message as being an antiunion one.[5]

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[1] We have amended the caption to reflect the disaffiliation of the United Food and Commercial Workers from the AFL–CIO effective July 29, 2005.

[2] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation to overrule Union's Objections 1, 2, 3, 5, and 6, and the portion of Objection 4 that alleged the refusal to process a grievance.

[4] All dates hereafter refer to 2004.

[5] See *Comet Electric*, 314 NLRB 1215, 1216. In that case, the employer withheld pay as a "punishment" of employees for seeking union

The Employer was placing its finger on one of the employees' most vulnerable spots—wages—and, in effect, indicating "Here is where we can hurt you and your union is powerless to do anything about it." We conclude that the unilateral elimination of a longstanding economic benefit 2 days before the election would reasonably send a message to unit employees that the seeming inability of the incumbent Uni[5]on to protect them from the Employer's detrimental actions made the Union's continued presence as a bargaining representative pointless.[6]

The dissent suggests that there is a difference between the grant of a benefit and the imposition of a detriment. We disagree. The use of carrots *and* sticks can upset the atmosphere in an election campaign. With respect to the former, the Supreme Court said in *NLRB v. Exchange Parts*, 375 U.S. 405:

> The danger inherent in well-time increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

With respect to the latter (the stick), the benefit here has in fact dried up, and the timing suggests that this was tied to the campaign.[7]

The Employer defends its conduct on two grounds. First, it argues that its conduct was not a purposeful act designed to influence the election. Second, it contends that its conduct was de minimis. The hearing officer properly rejected these arguments. In determining whether conduct is objectionable, the Board does not inquire whether an employer's actions were intentional or actually affected the results of the election. The test is not a subjective one, but an objective determination of whether the conduct of a party to an election has the tendency to interfere with the employees' free choice. *Cedars-Sinai Medical Center*, 342 NLRB No. 58 (2004); *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995). The Board has long held that the subjective reactions of employees are irrelevant to the question of whether there was in fact objectionable conduct. *Hopkins Nursing Center*, 309 NLRB 958 (1992). Thus, the asserted lack of purpose or actual effect on the election is not germane to whether the conduct was objectionable. We find that the test is met here, given the seriousness of the Employer's conduct, the timing of the announcement of the elimination of the bonus 2 days before the election, the wide dissemination of the announcement, the closeness of the vote and the Employer's failure to effectively inform employees that the bonus had been restored.

Further, we find that the elimination of the bonus was not de minimis. The announced discontinuance of the bonus was directed to CNAs, who constitute almost three-quarters of the unit employees. The announcement was also widely disseminated throughout the facility to more than a determinative number of unit employees.[8] Not only was it posted, but, as noted above, Rodriguez also personally informed all of the CNAs who were present that the bonus had been eliminated. It was also widely discussed up until at least the start of the election. The Employer did not attempt to retract its announced decision until less than a day before the election, and it failed to establish that all affected individuals were notified of its attempted recall of the new, economically detrimental policy.

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representation. We see no significant distinction between that case and a case where, as here, the Employer supports an anti-union decertification effort.

[6] The dissent suggests that the announcement might have been a mere miscommunication. However, Rodriguez testified that, by rescinding the bonus, the Employer was intentionally attempting to get the same work from the CNAs (and its nurses) for lower wages. We therefore agree with the hearing officer that the announcement was more than just an inadvertent mistake or clerical error but the purposeful conduct by two of the Employer's agents. In any event, even if it were a "miscommunication," the fact remains that the Employer told employees that they had lost a longstanding benefit.

The dissent then proceeds to assume that the announcement had a purpose but that the purpose was to reduce costs rather than to influence the election. However, the Board's test is whether the conduct had a tendency to interfere with the free choice of employees. The conduct here, including its timing, had such a tendency.

The dissent also states that the Employer did not oppose the decertification initiative, and thus "no retributive or punitive inference is warranted." The logic of his argument eludes us because it is clear that the Employer opposed the Union and made that fact known to employees. The elimination of the benefit was in the context of that opposition to continuing representation. Moreover, the announcement, occurring after the decertification petition was filed and 2 days before the election, would reasonably be construed as an attempt to undermine the employees' support for the Union and to coerce them into voting to oust the incumbent Union by making it seem impotent in the face of the Employer's action.

[7] The dissent makes much of the observation that the Employer's conduct here cannot be viewed as a rational attempt to influence the outcome of the election, and thus no reasonable employee could view the conduct as such an attempt. However, the objective fact here is that the Employer *did* announce, on the eve of the election, a unilateral change in employee compensation, and, in fact, this announcement did cause employees to become alarmed and concerned about their pay. Whether or not the Employer's conduct was "rational," it did have the tendency to interfere with the election, and to find otherwise is to ignore the reality of the workplace.

[8] *Delta Brands, Inc.*, 344 NLRB No. 10 (2005), relied upon by our colleague, is inapposite. There the Board (Member Liebman dissenting) found that an employer's handbook rule did not affect the elections on the basis that there was no evidence that the unit employees were aware of the rule. In contrast, here, knowledge of the elimination of the bonus was widespread.

Additionally, we cannot ignore the fact that the election was extremely close.[9] The Board has held that objections must be more carefully scrutinized in close elections.[10] Here, the election margin was only three votes, and many more unit employees than that heard of the Employer's revocation of the bonus.[11] In fact, the Employer's announcement had caused an angry disruption in the facility and even at the time of the voting employees were questioning Rodriguez as to whether the bonus was still eliminated. Under these circumstances, we find that the announced elimination of the bonus could well have affected the outcome of the election.[12]

Our dissenting colleague, citing *Virginia Concrete Corp.*,338 NLRB 1182 (2003), argues that the objection should also be dismissed inasmuch as no unfair labor practice charge was filed or litigated. We disagree. First, this argument was not raised by the Employer, and the Petitioner's objection is not based on a failure to bargain allegation. Moreover, the failure to file an unfair labor practice charge regarding preelection conduct does not constitute a waiver of a party's right to allege that the conduct was objectionable. Even if there are no unfair labor practice charges, the Board can find the conduct objectionable unless such conduct can only be held to interfere with the election upon an initial finding that an unfair labor practice was committed. *Virginia Concrete Corporation*, supra, at 1186 fn.8; *National League of Professional Baseball Clubs*, 330 NLRB 670, 677 (2000). Here, unlike *Virginia Concrete Corporation*, the objection does not depend on the finding of an unfair labor practice. As demonstrated above, we can determine whether the announced elimination of the bonus interfered with the election independent of any unfair labor practice finding. Indeed, in *Virginia Concrete* itself the Board analyzed, apart from unfair labor practice considerations, whether under representation case principles an employer's grant of a wage increase during a decertification campaign constituted objectionable conduct. Id at 1184 fn. 5.[13]

Thus, we agree with the hearing officer that the Employer's announced elimination of the extra shift bonus tended to interfere with the expression of employees' free choice in the election. Accordingly, we sustain that portion of Objection 4, set aside the election on this basis, and order that a new election be held.

DIRECTION OF A SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the election date and who retain their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the strike began who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by Service Employees International Union, 1199 Florida, AFL–CIO.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*,

[9] *Cedar-Sinai Medical Center*, supra; *Cambridge Tool & Mfg. Co.*, supra.

[10] *Robert Orr-Sysco Food Services*, 338 NLRB 614 (2002); *Cambridge Tool & Mfg. Co.*, supra.

[11] That is, a shift of two votes could possibly have altered the outcome of the election.

[12] Our colleague believes that because no employee actually suffered a detriment, the announcement of the change in bonus pay could not have affected the results of the election. However, that analysis misses the mark, for two reasons. First, it is premised on faulty assertions—that only a few employees were affected and that the announcement was quickly withdrawn. As the record shows, however, the vote was close—only a three vote margin—and those most affected by the announcement constituted over a majority of the unit. Further, the Employer's attempted withdrawal did not occur until almost a day later, and the Employer failed to show it reached all of the affected employees. Second, as explained above, the issue is not whether employees suffered a detriment; rather, it is whether the Employer's conduct interfered with the election. Similarly, the test is not whether the conduct actually affected the vote of any particular employee. Rather, the test is whether the conduct had a tendency to interfere with the free choice of a reasonable employee.

[13] In fact, as there has been no finding that a contract is in effect, the change could not be alleged as an unlawful unilateral change in contractual benefits. As noted above, the Employer does not argue that its announced change in removing extra shift bonuses was privileged as consistent with past practice; it simply claims that the announcement was a mistake that was not intended to influence the election and that whatever impact it had on the election was de minimis. As discussed above, we find these arguments to be without merit. Contrary to the dissent's claim, we are not establishing a rule that any unilateral change during the critical period is objectionable. Rather, we find that the conduct engaged in by this Employer during this campaign was objectionable.

156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

Accordingly, it is directed that an eligibility list containing the full names and addresses of all eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of the Second Election. North Macon Health care Facility, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election if proper objections are filed.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER SCHAUMBER, dissenting in part.

My colleagues properly adopt, in the absence of exceptions, the hearing officer's recommendation to overrule objections 1, 2, 3, 5, and 6, and I join them in doing so. However, I disagree that the underlying election, a decertification vote, should be set aside because an apparent miscommunication[1] between a frontline supervisor and clerk resulted in the announcement, shortly before the election, of the discontinuation of a popular benefit, an extra shift bonus. Apart from the fact that the announcement was immediately rescinded when brought to the attention of management the next day, the bonus was never discontinued, and good-faith efforts were made to communicate the correction to employees, employees would not reasonably view the announcement of the rescission of a benefit prior to a vote to decertify the union as an effort to discourage their support for the union...In this regard, while not relied upon for purposes of this dissent, no evidence exists that the miscommunication affected the vote of any eligible voter much less that it was intended to achieve such a result. Nonetheless, the hearing officer found, and my colleagues agree that "the announcement sent the message to unit employees that the Employer had the power to grant or eliminate wages and benefits, and was reasonably calculated to influence employees to vote against the Union." As more fully explained herein, my colleagues' decision is inconsistent with the law, logic, and common experience. Accordingly, I respectfully dissent.

As we recently reiterated, "representation elections are not lightly set aside" and "the burden of proof on parties seeking to have a Board-supervised election set aside is a heavy one." *Delta Brands, Inc.*, 344 NLRB No. 10, slip op. at 2 (February 7, 2005) (citations and internal quotations omitted). "[T]he Board looks to all of the facts and circumstances to determine whether the atmosphere was so tainted as to warrant the setting aside of the election." Id. In the instant case, the hearing officer did not hold the Union to that "heavy burden," but instead inferred interference, relying upon a line of precedent holding that wage and benefit *increases* implemented during the critical period create a presumption or inference of unlawful interference that the employer may rebut with proof of a legitimate business reason for the increase unrelated to the election outcome.[1] See generally *Virginia Concrete Corp.,* 338 NLRB 1182, 1184 (2003). Such a presumption or inference, however reasonable in the context of a conferral of a benefit, loses its logical moorings in the context of an announced change that is detrimental to employees; no rational employer "reasonably calculates" that announcing the rescission of a popular benefit shortly before a decertification vote is likely to influence employees to vote *against* the union.[2] Nor is there war-

[1] Oddly, my colleagues assert that the announcement of the discontinuation of the bonus was "purposeful" conduct, then accuse me of "assuming" a purpose. I do not contend that the announcement was not purposeful, but rather that the clerical employee who made the announcement did so after misinterpreting an instruction from a supervisor, as testimony at the hearing indicated. However, even if one assumes, as my colleagues and the hearing officer do, that the purpose of the announcement was to see whether employees would work extra shifts without a bonus, that is a purpose wholly unrelated to interference with the election. I would agree that reasonable employees would be far more likely to view the announcement as an effort to reduce costs than an attempt to interfere with or coerce them in their choice on union representation. Of course, the most reasonable reaction on the facts of this case would be that a mistake was made and promptly corrected.

[1] The hearing officer relied on *Atlantic Forest Products*, 282 NLRB 855 (1987); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); and *Doane Pet Care, DPC*, 342 NLRB No. 115, fn. 2 (2004).

[2] The Supreme Court has instructed the Board that its presumptions "must rest on a sound factual connection between the proved and inferred facts." *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979); *Republic Aviation v. NLRB*, 324 U.S. 793 (1945). No such connection exists between the announcement of a detrimental change and an inference of intent to thereby coerce employees to vote against an incumbent union. Indeed, such an inference is contrary to common sense and experience. My colleagues assert that whether an employer intends its conduct to interfere with an election or whether the conduct actually affected the election are irrelevant because the test is an objective one viewed from the standpoint of a reasonable employee. That is true to a point. However, the test with respect to a conferral of a benefit within the critical period is whether employees "would reasonably view the

rant to presume or infer that employees would reasonably view such an announcement as an attempt to discourage their support for the incumbent union.

Even in cases considering the effect of a critical period conferral of benefit, the burden is on the general Counsel to prove, by a preponderance of the evidence, "that employees would reasonably view the grant of benefits as an attempt to interfere with or coerce them in their choice on union representation." *Southgate Village Inc.*, 319 NLRB 916 (1995). That burden was on the objecting party here and has not been met. My colleagues' willingness to substitute presumptions for proof (or to infer motivation without a sound basis in fact) contravenes the principles set forth in *Delta Brands, Inc.*, supra, slip op. at 2 ("Our [dissenting] colleague presumes that employees are 'affected' by [a handbook rule]. She indulges in this presumption because there is no evidence of such an effect . . . . [T]he burden is on the objecting party to prove its objection, and without such a presumption, that burden is not satisfied here.")

In limited circumstances, the Board has found that the delay (or announcement of delay) of a wage increase or imposition of some other economic detriment constituted objectionable conduct, but only where a demonstrable causal nexus exists between the detriment and the election campaign such that "employees would reasonably perceive that the Union's campaign had caused them to suffer an economic detriment." *Comet Electric*, 314 NLRB 1215 (1994) (objectionable conduct found where employer forced employees to sit through captive audience speech in order to pick up paychecks and failed to pay employees for the meeting; by its conduct employer "effectively punished [employees] for seeking union representation.").[3] No such causal connection exists here.[4] The campaign at issue was a decertification initiative, which the Employer did not oppose, so no retributive or punitive inference is warranted.[5] Nor did the Employer tie the announcement in any way to the pendency of the election or to its outcome. Thus, this case is both factually and analytically distinguishable from decisions such as *Atlantic Forest Products*, relied upon by the hearing officer, in which the Board found violations and, *a fortiori*, objectionable conduct,[6] where an employer announced a delay and postponed a scheduled wage increase because of a pending representation election, made various statements disparaging the union and blaming it for the delay, and suggested that both the timing and amount of future increases would be uncertain if the union prevailed in the election. 282 NLRB 858–859.

Unable to demonstrate any factual nexus between the announcement and the election (compare the cases cited

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grant of benefits as an attempt to interfere with or coerce them in the choice on union representation." See fn. 4, infra. If no rational employer would engage in particular conduct in order to influence the outcome of an election, here the discontinuance of an extra bonus shift, no reasonable employee would view the conduct as such an attempt.

[3] See also *Martin Industries*, 290 NLRB 857, 860 (1988) (adopting judge's findings of 8(a)(3) and (1) violations where historic merit wage increases were granted to other employees but admittedly withheld from employees in petitioned-for unit because of pending representation case and only after the employees selected the union; unit employees "would clearly attribute the loss of wages to the successful union campaign."). My colleagues see no "significant difference" between this case and others, such as *Comet Electric*, in which there was a direct tie between the conduct at issue and the representation election. Therein lies the problem. In *Comet Electric*, the employer forced virtually all of its employees to attend a 2–1/2 hour anti-union captive audience speech on pay day, withheld employee paychecks until the conclusion of the meeting, and did not pay the employees for most of the time spent in the meeting, which extended well beyond the conclusion of the employees' normal work day. Under those circumstances, the Board concluded that the "employees would reasonably perceive that the Union's campaign had caused them to suffer an economic detriment" and that "by failing to pay employees for the time spent in the meeting and by delaying their paychecks, it effectively punished them for seeking union representation." By contrast, no employee in the instant case suffered an economic detriment as a result of the announcement, the announcement was tied in no way to the existence of the decertification election, the benefit at issue applied only to employees who signed up for extra shifts, and the announcement was withdrawn within hours.

[4] My colleagues suggest that no causal connection need be established because "it is clear that the Employer opposed the Union . . . and the elimination of the benefit was, in the context of that opposition." However, employers have a statutory right to oppose unions, see Sec. 8(c), and nothing in the manner in which the Employer expressed its opposition in this case was alleged or found to be unlawful. Again, my colleagues simply infer from the fact of opposition that any change occurring in that "context"—even one as de minimis as the short-lived announcement here—constitutes objectionable conduct. As noted above, Board precedent is to the contrary, and requires a causal nexus between the allegedly unlawful detrimental change and the representation election, such that employees would reasonably view the change as an attempt to coerce or interfere with employee choice on union representation.

[5] My colleagues would infer a punitive or retributive motive from the fact of the Employer's opposition to the Union. However, that opposition only negates the inference my colleagues draw. Here, the Union was the incumbent representative of the employees, and the announcement occurred only *after* employees had petitioned *to vote out the Union*. Had the announcement followed on the heels of the initial certification of the Union, such an inference might make sense. But reasonable employees undoubtedly recognize that you do not punish someone for doing something which you presumably support.

[6] In *Dal-Tex Optical Co.*, 137 NLRB 1782, 1786–1787 (1962) the Board stated that "conduct violative of Section 8(a)(1) is, a fortiori, conduct which interferes with the exercise of a free and untrammeled choice in an election." Applying that reasoning, Board decisions have directed new elections where objections parallel to conduct found to violate Sect. 8(a)(1) have been filed, unless "it is virtually impossible to conclude that the misconduct could have affected the election results." Such was the case in *Forest Products*. I do not pass on the merits of the "virtually impossible" standard, which is plainly inapplicable here because no 8(a)(1) violations were alleged or found.

in fn. 5, supra, and accompanying text), my colleagues invoke the "fist in the velvet glove" maxim, from which to infer, contrary to logic and common experience, that rather than interpreting the announcement as a promptly rectified mistake, reasonable employees would construe what happened as an deliberate "attempt to undermine the employees' support for the Union and to coerce them into voting to oust the incumbent Union by making it seem impotent in the face of the Employer's action." I disagree. While I do not question generally the wisdom of the Board's approach to resolving objections in representation cases, I do question the wisdom of my colleagues' decision and their substituting presumptions for burdens of proof under the guise of the "fist in the velvet glove" doctrine. which was applied by the Supreme Court and all subsequent Board cases relying on it to grants of benefits before a vote for union representation, not withdrawal of benefits before a vote for union decertification. Further, how an isolated incident such as this, one corrected literally overnight with no actual adverse impact on anyone, would make the Union seem impotent in the eyes of a reasonable employee, my colleagues fail to explain. Certainly, as mentioned, no employee testified to that interpretation. Indeed, the one employee who protested most vocally in response to the announcement, testified that the incident did not impact her vote all. But, again, neither facts, nor logic, nor common experience carry the day here; at bottom my colleagues conclude that the announcement had a reasonable tendency to affect the election simply because they say it did (to find otherwise is to ignore the reality of the workplace).

In effect, my colleagues apply a rule that any unilateral change or announcement thereof during the critical period—regardless of whether that change has been alleged as and found to be an unfair labor practice, and regardless of whether there is evidence that the change or announcement affected the election outcome—constitutes objectionable conduct. That is not the law. See, e.g., *Virginia Concrete Corp.*, supra, 338 NLRB at 1186 (declining to find objectionable conduct in the absence of an unfair labor practice charge where the gravaman of the objection was that a wage increase violated Section 8(a)(5) because it was granted without giving the union notice and an opportunity to bargain). See also *National League of Professional Baseball Clubs*, 330 NLRB 670, 677 (2000) (regardless of whether alleged unilateral withholding of contractual wage increases might constitute an unfair labor practice, sole issue in a representation proceeding is whether the conduct was taken for or had the effect of influencing the election). In this case, no unfair labor practice charge was filed or litigated, nor was there any evidence that the short-lived announcement was intended to or did affect the outcome of the election.[7] Thus, the objecting party failed to carry its burden of proof, the objection should be overruled, and a certification of results should issue.

Dated, Washington, D.C. August 27, 2005

Peter C. Schaumber, Member

NATIONAL LABOR RELATIONS BOARD

[7] I do not, as my colleagues contend, argue that objectionable conduct may not be found absent the filing of an unfair labor practice charge. Rather, my point is that conduct that *might be* found to constitute an unlawful unilateral change *if alleged and proven*, does not, a fortiori, constitute objectionable conduct in the absence of such a finding. My colleagues effectively extend the *Dal-Tex Optical Co.* standard to any unilateral change or announcement thereof within the critical period.